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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 BLACKSTONE INTERNATIONAL,
9 LTD.,

10 Plaintiff,

11 v.

12 E2 LIMITED; COLLIN CARPENTER;
13 BIG BOX SALES & MARKETING
14 INC.; and TECHNOMATE
15 MANUFACTORY, LTD.,

16 Defendant.

17 C20-1686 TSZ

18 MINUTE ORDER

19 The following Minute Order is made by direction of the Court, the Honorable
20 Thomas S. Zilly, United States District Judge:

21 (1) Defendants' second motion to dismiss, docket no. 98, is DENIED. In their
22 motion, Defendants move to dismiss the second, fourth, and fifth causes of action in the
23 second amended complaint. Those causes of action are, respectively, common law unfair
competition, violations of the Lanham Act (15 U.S.C. § 1125), and violations of the
Washington Consumer Protection Act (RCW 19.86, *et seq.*)("CPA"). Second Am.
Compl. ("SAC") ¶¶ 147, 199, 261.

1 (2) Regarding Plaintiff's Lanham Act claim,¹ Defendants argue that Plaintiff
 2 has not adequately alleged secondary meaning for its trade dress to satisfy the Lanham
 3 Act. *See Resp.* at 10 (docket no. 105 at 18). The operative complaint is filled with
 4 allegations that Plaintiff's fans enjoy secondary meaning in the marketplace. *See SAC ¶¶*
 5 84, 108, 111, 119–120, 133, 135, 208, 211, 227, 257. Indeed, if these averments were not
 6 enough, Plaintiff also has pleaded that Defendants intentionally copied Blackstone's
 7 designs, *see SAC ¶¶* 119–120, 227, and “courts have held that evidence of deliberate
 8 copying establishes a *prima facie* case of secondary meaning.” *Fryer v. Brown*, 2005 WL
 9 1677940, at *3 (W.D. Wash. July 15, 2005).

10 (3) Defendants argue that Plaintiff's designs are functional, which would
 11 prevent coverage under the Lanham Act. This argument attempts to contradict the
 12 complaint. *See, e.g.*, SAC ¶ 116 (“[The] trade dress as embodied in the packaging, overall
 13 design, louver system, grill, arched top form, control panel layout, control panel and
 14 icons, logo application, cylindrical stock, base, fit, and finish of the Blackstone Tower
 15 Fan . . . have acquired secondary meaning, and is *not functional*.” (emphasis added)).
 Plaintiff also adequately alleges the non-functional, aesthetic advantages that these
 features provide. *See SAC ¶ 217; see also Mosaic Brands, Inc. v. Ridge Wallet LLC*,
 2021 WL 922074, at *4 (C.D. Cal. Jan. 7, 2021).²

16 (4) Defendants also contest Plaintiff's false designation of origin theory under
 17 the Lanham Act. As to this theory, Plaintiff must allege that “the defendant (1) used in
 18 commerce (2) any word, false designation of origin, false or misleading description, or
 19 representation of fact, which (3) is likely to cause confusion or misrepresents the
 20 characteristics.” *Nw. Univ. v. King Cnty.*, 2021 WL 326975, at *3 (W.D. Wash. Jan. 14,
 21 2021). Defendants only contest the second element in this test.³ Mot. at 12–13. Here,
 22 Blackstone alleges that Defendants manufactured and/or distributed fans that Defendants
 23 labeled as “Distributed by Blackstone International Ltd.” See SAC ¶¶ 201–213. Plaintiff
 also alleges that Defendants “falsely, wrongfully, improperly, and without authorization”
 used Plaintiff's labeled customer service information and warranty cards. *Id.* at ¶ 213.

17 ¹ The test for determining unfair competition is the same as it is for considering infringement of
 18 an unregistered mark or trade dress. *Slep-Tone Entm't Corp. v. Wired for Sound Karaoke & DJ*
 19 *Servs.*, LLC, 845 F.3d 1246, 1249 (9th Cir. 2017). (docket no. 98).

20 ² Regardless, arguments concerning functionality are better left for summary judgment or trial.
 21 *See Loops, LLC v. Amercare Products, Inc.*, 636 F. Supp. 2d 1128, 1136 (W.D. Wash. 2008)
 22 (holding that trade dress functionality is a “heavily fact-intensive” inquiry); *see also Blumenthal*
 23 *Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859 (9th Cir. 2020) (discussing functionality on a
 post-trial appeal).

24 ³ Defendants also argue that Plaintiff's complaint lacks allegations about intent, but “[i]n a false
 25 designation claim, . . . intent or knowledge is not a required element.” *Sebastian Int'l, Inc. v.*
Russolillo, 186 F. Supp. 2d 1055, 1069 (C.D. Cal. 2000)

(5) Finally, Defendants arguments for a fair use defense present questions of fact that are not appropriate on a motion to dismiss. See *Arrowood Capital, Inc. v. Freedom Healthcare of Am.*, 2021 WL 4353271, at *5 (C.D. Cal. July 9, 2021) (“it is very rare for a court to decide fair use at the motion to dismiss stage.”); see also *Wright v. Colvin*, 2013 WL 1788493, at *4 (E.D. Wash. Apr. 26, 2013).

(6) Concerning the CPA, Defendants argue that this claim is indelibly linked to Plaintiff’s Lanham Act claim because Plaintiff has no other sufficient allegation concerning public harm. The Court agrees. Besides its Lanham Act claim, the operative complaint alleges no other public harm that would satisfy the CPA. But Plaintiff adequately alleges its Lanham Act claim, which, in turn, satisfies the CPA’s public harm requirement. *See Nat’l Prods. v. Arkon Res., Inc.*, 294 F. Supp. 3d 1042, 1049–50 (W.D. Wash. 2018).

(7) The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Dated this 13th day of March, 2023.

Ravi Subramanian

Clerk

s/Laurie Cuaresma

Deputy Clerk